**JOHN ANG & JEGA**

**v.**

**KULASINGAM SINATAMBY**

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[PETITION NO: 17-7-1998]
28 JANUARY 2001

***LEGAL PROFESSION:*** *Remuneration - Bill of costs - Gross sum bill - Application for taxation of costs by petitioner solicitor - Governing provision - Whether s. 126 or s. 121 Legal Profession Act 1976 - Application of s. 126 to detailed bills - Whether Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd correctly decided - Application of s. 121(1)(b) to gross sum bills - Whether only upon specific conditions being met - Prohibition under s. 128 - Whether applies to clients only*

This was an application by the petitioner law firm for taxation of costs of its gross sum bill between solicitor and client under s. 126 of the Legal Profession Act 1976 ('the Act'). The respondent was the client of the petitioner. The issues were: (1) whether the application should have been made under s. 121 of the Act; (2) whether the petitioner should have provided an itemised bill to the respondent; (3) whether s. 126(1) of the Act requires the petitioner to obtain an order for taxation within the relevant time frame; (4) whether the prohibition under s. 128(2) of the Act applies to the petitioner; (5) whether the respondent was served with two gross sum bills instead of one; (6) whether s. 126 applies to detailed bills in view of the decision in *Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd.*

**Held:**

**[1]** The facts showed that neither the respondent nor his solicitors were in any doubt as to the contents of the bill and as to the details of the work done. Having failed to ask for a detailed bill within the time limit as prescribed in proviso (a) to s. 121(1) of the Act, the respondent was precluded from raising the issue at this point of time. Further, a taxing order would not prejudice the respondent.

**[2]** The phrase "may be obtained by a petition" in s. 126(1) of the Act must be construed to mean "may be obtained by a petition filed" within the relevant time frame. Local cases on the construction of s. 126(1) of the Act have all assumed that the provision requires the applicant to apply rather than obtain an order within the relevant time frame.

**[3]** The prohibition in s. 128(2) of the Act that no order for taxation shall be made after the expiry of one year from the delivery of the bill of costs relates to applications for taxation by clients and not by solicitors. Section 128(1) specifically mentions "six months" which happens to be the time limit applicable to clients as stated in s. 126(1). Moreover, the need on the part of the client to give notice to the solicitor clearly confines s. 128 to applications by clients.

**[4]** The first bill of costs referred to by the respondent was in fact a letter which was a proposal for the settlement of costs. That letter was a part of a series of correspondences between the parties concerned. The one and only bill of costs was annexed to the letter at the end of the series of correspondences.

**[5]** Sections 126 and 128 are contained in Part IX of the Act on "Recovery and Taxation of Costs" and Part IX makes no distinction between gross sum bills and detailed bills. It followed that both the sections are general in nature and applied to both types of bills as defined under s. 121.

**[5a]** Section 121 is contained in Part VIII of the Act on "Remuneration of Advocates and Solicitors" and are specific provisions on the principles governing solicitors' remuneration. Section 121(1) is confined to contentious business and prov. (b) to the said section applies to gross sum bills only.

**[5b]** Section 121(1)(b) of the Act is only applicable when (i) the business done or undertaken by the solicitor is confined to contentious business; (ii) the renumeration of the solicitor is not the subject of an agreement; (iii) the bill, which must have been delivered to comply with s. 124 of the Act, is a gross sum bill; and (iv) an action is commenced on the gross sum bill. The client will then have one month from the date of the service of the writ to request the court to tax the bill and the six-month period under s. 126 of the Act should not be a relevant consideration.

**[5c]** In view of the above, the court did not agree with the learned judge's decision in *Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd* that in an apparent conflict between s. 121(1)(b) of the Act on the one hand with that of s. 126(1) and s. 128(1) of the Act on the other hand, the latter provisions must be construed to refer to a detailed bill of costs and not to a gross sum bill.

**[6]** There was no justification that the employment of s. 126 of the Act by the petitioner was wrongly employed. Admittedly, the petitioner's bill was for a gross sum and the application for an order for taxation was correctly made under s. 126 of the Act.

*[Order in terms of prayers (i), (ii) and (iii) of petition.]*

**Case(s) referred to:**

*AG for Canada v. Hallett & Carey Ltd [1952] AC 427* ***(refd)***
*Assam Railways & Trading Co v. IRC [1935] AC 445* ***(refd)***
*Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127* ***(dist)***
*Edinburgh Street Tramways v. Torbain [1877] 3 App Cas 58* ***(refd)***
*Ex parte Farmers' Fertilizers Corporation Ltd [1916] 16 SR (NSW) 645* ***(refd)***
*Ex parte Hemming 28 LT 144* ***(refd)***
*Harry Lee Wee v. Haw Par Brothers International Ltd [1980] 2 MLJ 228* ***(refd)***
*Hitchcock v. Stretton [1892] 2 Ch 343* ***(refd)***
*In re Baylis [1896] 2 Ch 107* ***(refd)***
*In re RG Thompson [1894] 1 QB 462* ***(refd)***
*In re West King and Adams [1892] 2 QB 102* ***(refd)***
*IRC v. Bates [1965] 1 WLR 1133* ***(refd)***
*Parasuraman Kuppan v. Sazali Md Akhir & Anor [1999] 4 CLJ 1* ***(dist)***
*Phuah Choon Hwang & Anor v. Hassan & Kong Yeam [1986] 1 CLJ 513* ***(refd)***
*Saif Ali & Anor v. Sydney Mitchell & Co (A Firm) & Ors [1980] AC 198* ***(refd)***
*Salutary Avenue (M) Sdn Bhd v. Malaysia Shipyard and Engineering Sdn Bhd & Anor [1999] 7 CLJ 514* ***(dist)***
*Storer & Co Ltd v. Johnson [1890] 15 App Cas 203* ***(refd)***
*Westminster Bank Ltd v. Zang [1966] AC 182* ***(refd)***
*Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd [1999] 1 CLJ 239* ***(not foll)***

**Legislation referred to:**

Legal Profession Act 1976, Part VIII, IX, ss. 112-136
Rules of the High Court 1980, O. 24 r. 12

**Other source(s) referred to:**

*Halsbury's Laws of England*, 4th edn, re-issue, vol 44(1), p 172

*For the petitioner - J Chandrika (Lathika Prabhakaran with him); M/s John Ang & Jega*
*For the respondent - S Ravi Chandran; M/s Anad & Noraini*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Abdul Malik Ishak J:**

**Enclosure 2 – The Petitioner's Petition And The Objection**

This was an application by the petitioner for the taxation of costs between solicitor and client under s. 126 of the Legal Profession Act 1976 ("Act"). The legal work that was involved was carried out during a period of time stretching from November 1992 to March 1993 and the client was none other than the respondent. The petitioner is a well known law firm in Johor

Bahru and it goes by the name and in the style of Messrs John Ang & Jega, and it is that law firm that is now entitled to the costs. The solicitor who undertook the legal work is a hardworking and upright individual by the name of Mr. S. Gunasegaran ("Mr. Guna") and at the material time he was practicing as a sole proprietor in the name and style of Messrs Guna & Co. To consolidate his legal practice, Mr. Guna decided to join Messrs John Ang & Jega as a partner and this took effect on 12 April 1993. With effect from that date Messrs Guna & Co. merged with Messrs John Ang & Jega and with that merger the petitioner became entitled to the costs as claimed in encl. 2.

By way of encl. 2, the petitioner prayed that:

(i) the said Bill of Costs may be taxed by this Honourable Court on a solicitor and client basis;

(ii) the respondent do pay to the petitioner the taxed costs;

(iii) the costs of this petition be paid by the respondent; and

(iv) such further or other directions be given as deemed fit by this Honourable Court.

And encl. 2 was supported by an affidavit affirmed by Mr. Guna on 15 April 1999 as seen in encl. 3.

Mr. S. Ravi Chandran for the respondent argued that s. 126 of the Act was not the correct section to utilise to move the machinery of the court as reflected in encl. 2 and it was his submission that the correct section should be s. 121 of the Act. He relied heavily on the authority of *Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd* [1999] 1 CLJ 239, a decision of Augustine Paul J. I shall in the later part of this judgment examine the case of *Yau Jiok Hua* in some detail. In regard to the intitulement that appeared in encl. 2 of which Mr. S. Ravi Chandran took exception and said that it was wrongly intituled, the case of *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 was cited as an authority to strike out encl. 2 in limine. Gopal Sri Ram JCA writing a separate judgment for the Court of Appeal in the case of *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman (supra)* said at p. 142 of the report:

> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court

> under which the court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

and the sage words of his Lordship, with respect, cannot be applied in the context of encl. 2 because that enclosure wherein the petition was housed in specifically stated s. 126 of the Act in its intitulement. The observations of Gopal Sri Ram JCA in *Cheow Chew Khoon* were rightly made in the context of that case because the summons there did not "state any particular rule of court in its intitulement" (see p. 142 at line "h" of that judgment).

Not to be outwitted, Mr. S. Ravi Chandran for the respondent proceeded further. He submitted that the wrong section of the Act was employed in the intitulement in encl. 2. Instead of s. 121 of the Act, the petitioner cited s. 126 of the Act. He then drew my attention to the case of *Parasuraman a/l Kuppan v. Sazali bin Md. Akhir & Anor* [1999] 4 CLJ 1, a decision of the Court of Appeal. That was a case where the respondents filed an application by way of a notice to produce in encl. 72 under and pursuant to O. 24 r. 12 of the Rules of the High Court 1980 ("RHC") and the Court of Appeal frowned against the usage of the said order and this was what the Court of Appeal said at p. 10 of the report:

> However, O. 24 of the RHC refers to matters begun by writ (see O. 24 r. 1). The present matter is an appeal and is not a writ action. Hence O. 24 is irrelevant and misplaced for Encik Visvanathan to invoke. Before us, Encik Visvanathan conceded that he was wrong in proceeding by way of encl. 72 but contended that the court has inherent jurisdiction to hear it. With respect, we disagreed. Why should the court invoke its inherent jurisdiction in favour of a party whose counsel/solicitor wrongly invoked the procedure and which procedure entailed undue hardship to the opposite party? This issue was raised by Encik Francis Nathar before the learned judge but it was unfortunate that the learned judge did not give due consideration to this substantial procedural issue. (See p. 88 of the appeal record).
>
> On this ground alone, the learned judge should have dismissed encl 72 ...

It would be apparent that O. 24 r. 12 of the RHC makes no reference at all to a notice to produce although encl. 72 was filed for that purpose. No wonder the Court of Appeal took exception to encl. 72.

Next, the case of *Salutary Avenue (M) Sdn Bhd v. Malaysia Shipyard and Engineering Sdn Bhd & Anor* [1999] 7 CLJ 514 was cited in order to advance the proposition that procedural requirements must be strictly adhered to. Indeed in that case this was what I said at p. 532 to p. 533 of the report:

Order 7 r. 3(1) of the Rules of the High Court 1980 ("RHC") states that:

> 3(1)Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

and it clearly requires the plaintiff to state in their originating summons precisely the nature of the relief or remedy sought; a mandatory requirement since there is the use of the word 'must' which denotes a peremptory obligation placed on the plaintiff. It follows therefore that since the plaintiff did not state precisely the nature of the relief or remedy sought, then the plaintiff should make a formal application to this court for leave to amend the originating summons in encl 4. But alas, there was no such formal application. It must be borne in mind that the RHC is a complete set of rules and it is not devoid of procedure for an application of this nature to be made. Order 20 r. 5(1) of the RHC provides that the plaintiff, if they wish to amend their originating process, should seek the leave of the court and leave may be granted by the court on such terms as to costs as may be just. Now, although O. 20 r. 5 of the RHC speaks of proceedings commenced by writ, the rule is equally applicable to proceedings begun by originating summons since O. 20 r. 7 of the RHC provides that:

> Rule 5 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a writ.

Encl 4 was filed on May 13, 1998, and there was plenty of opportunity for the plaintiff to file a formal application for leave to amend their originating summons and yet the plaintiff saw it fit, for reasons only known to themselves, not to file a formal application under O. 20 of the RHC. I reject outright the plaintiff's informal application.

and it can never be equated to the petition in encl. 2.

The only way to resolve the preliminary objection of Mr. S. Ravi Chandran would be to reproduce both ss. 126 and 121 of the Act. I will now proceed to reproduce s. 126 of the Act:

> (1) An order for the taxation of a bill of costs delivered by an advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitor, at any time within six months from the delivery of the bill, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from, the delivery.

(2) The order shall contain such directions and conditions as the court thinks proper, and any party aggrieved by any order of Court may apply by summons in chambers that the same may be amended or varied or set aside.

(3) In any case where an advocate and solicitor and his client consent to taxation of a solicitor's bill the Registrar may proceed to tax the bill notwithstanding that there is no order therefor.

and it relates to "taxation of a bill of costs."

Whereas s. 121 of the Act enacts as follows:

(1) Where the remuneration of an advocate and solicitor in respect of contentious business done by him is not the subject of an agreement made pursuant to section 116, the solicitor's bill of costs may at the option of the advocate and solicitor either contain detailed items or be for a gross sum:

Provided that –

(a) at any time before service upon him of a writ or other originating process for the recovery of costs included in a gross sum bill and before the expiration of three months from the date of the delivery to him of the bill, the party chargeable therewith may require the advocate and solicitor to deliver to him *in lieu* of the cost a bill containing detailed items, and the gross sum bill shall thereupon be of no effect;

(b) where an action is commenced on a gross sum bill, the Court shall, if so requested by the party chargeable therewith before the expiration of one month from the service on that party of the writ or other originating process, order that the bill shall be taxed;

(c) if a gross sum bill is referred to taxation, whether under this section or otherwise, nothing in this section shall prejudice any rules of court with respect to taxation and the advocate and solicitor shall furnish the taxing officer with such details of any of the costs covered by the bill as the taxing officer may require.

2. Subsection (1) shall not apply to fees paid to an advocate and solicitor who is briefed as a senior counsel.

and it relates to the "solicitors bill of costs" which may "either contain detailed items or be for a gross sum". I can find, on reading both ss. 126 and 121 of the Act, no justification at all to say that the employment of s. 126 of the Act in the intitulement to encl. 2 was wrongly employed. Admittedly the petitioner's bill was for a gross sum and the application for an order for taxation was made under s. 126 of the Act. At para. 30 of encl. 3 – which was, as I said earlier, an affidavit of Mr. Guna that

was affirmed on 15 April 1999 and filed on 19 April 1999, there was reference to a letter dated 24 April 1997 from the petitioner to Messrs Lim & Hooi and in that letter there was reference to s. 121 of the Act. That letter dated 24 April 1997 was marked as exh. "SG 19" and it can be found in encl. 3 and it was worded as such:

**Re: Johor Bahru High Court Civil Suit No. 238 of 1984**
**Johor Bahru High Court Civil Suit No. 24-184-87**

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We refer to the above matters.

We note that your client has still not settled the costs and disbursements payable to our partner Mr S. Gunasegaran formerly of M/s Guna & Co for work done by him for your client in respect of the above matters. We would like to stress that our previous request for the sum of RM15,000.00 was made out of goodwill and indulgence to your client, having regard to the fact that our Mr S. Gunasegaran had previously acted for your client in many other matters. We had entertained the hope that the matter would be settled amicably in this manner, but unfortunately your client did not avail himself of this opportunity for an amicable settlement.

In the circumstances, we hereby give you notice that the previous offer of RM15,000.00 is hereby revoked as being a gross underestimate of the value of the work done for your client in respect of the above matters.

We now enclose herewith our Bill of Costs for a gross sum under Section 121 of the Legal Profession Act 1976 for your client's perusal and action.

Kindly indicate whether your client is prepared to make payment as stated therein or requires a detailed bill to be rendered.

As this is a long outstanding matter we would appreciate your urgent response thereto.

and it was this very letter that enclosed the petitioner's bill of costs. Mr. S. Ravi Chandran questioned the use of s. 126 of the Act in the intitulement to encl. 2 and the reference to s. 121 of the Act in the letter that was enclosed and annexed as an exhibit in encl. 3 and he said that two different provisions appeared in the same proceedings. He questioned the propriety of it all. Madam Lathika Prabhakaran assisted by Madam J Chandrika rightly submitted that the use of two different provisions in the same proceedings was hardly alarming and it should not be a cause for alarm. It was rightly submitted by these two fine lady lawyers that the body of the petition made the substance of the application crystal clear. In my judgment, the respondent was not embarrassed, nor prejudiced nor taken by surprise by the form employed in the petition as seen in encl. 2. The

objection advanced by Mr. S. Ravi Chandran was a mere storm in a teacup. It was an attempt to whittle down the impact of encl. 2, and that objection was indeed frivolous and vexatious. It was a waste of precious judicial time. Even if encl. 2 was wrongly intituled it made not a whit of a difference. This court in its original jurisdiction has the capacity and the inherent jurisdiction to hear and entertain encl. 2. *Halsbury's Laws of England*, 4th edn, re-issue, vol. 44(1) at p. 172 contains the following passage which should be vigorously applied to construe the petition in encl. 2:

> The power of the Supreme Court to order taxation of a solicitor's bill of costs rests firstly on its original or inherent jurisdiction over its officers, secondly on the jurisdiction under the Solicitors Act 1974 and thirdly on the jurisdiction of the court in dealing with contested claims (*Re Park, Cole v. Park* [1888] 41 Ch D 326 at 332 per Stirling J).

In the celebrated case of *Phuah Choon Hwang & Anor v. Hassan & Kong Yeam* [1986] 1 CLJ 513, Mohamed Dzaiddin J (now Chief Justice of Malaysia) allowed an application by an applicant to extend the time limited by s. 126 of the Act – where his Lordship took to be one year from the date of the application, in spite of the prohibition in s. 128(1) of the Act. At p. 517 of the report, his Lordship alluded to the inherent jurisdiction of the court and was of the view that the authorities showed that it was exercisable independently of statute. His Lordship quoted with approval the speech of Lord Halsbury LC in the case of *Storer & Co. Ltd v. Johnson* [1890] 15 App. Cas. 203 and this can be seen at p. 517 of the report:

> … I believe that your Lordships are all of opinion that in a proceeding under the Solicitors Act we cannot do what is asked to be done by the appellants. But it was of course open to the Court to pronounce a judgment which should do justice between the parties when once the case was brought before them. This was not a case in which the summons absolutely bound the Court as to the remedy which they should administer; and I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit …

In the same vein, Rajah J sitting in the Court of Appeal of Singapore in the case of *Harry Lee Wee v. Haw Par Brothers International Ltd* [1980] 2 MLJ 228 said at p. 230:

Ground I: On the question of whether the plaintiff is barred from obtaining any order for taxation under sections 120 and 122 of the Legal Profession Act, the learned Chief Justice did not proceed under these sections when he made his order for taxation. He was relying on the inherent jurisdiction of the court to exercise control over its officers and this was never in dispute before the learned Chief Justice. On this aspect of the matter his judgment says, 'It was not in dispute that the court, in the exercise of its general or original or inherent jurisdiction over its officers, may order taxation where its statutory jurisdiction is inapplicable.' There is therefore no need for us to say anything more on this ground.

To sum up, the inherent jurisdiction of the court to supervise its officers in the matter of costs has long been entrenched and it has its roots deeply rooted since time immemorial. It is certainly an indispensable tool to use as a clout for the speedy and efficient flow of the administration of justice. I will, without hesitation, exercise my inherent jurisdiction to adjudicate encl. 2 forthwith.

**Facts**

The bill of costs as alluded to in exh. "SG 19" of encl. 3 was dated 24 April 1997 and it was exhibited as exh. "SG 20" of encl. 3 and it was worded in this fashion:

Bill No.

Our Ref: SG/0440/92/sk Date:

Mr Kulasingam a/l Sinathamby
21 Jalan Sepoi, Fresh Breezes
80200 Johor Bahru

*In Account With*
M/s John Ang & Jega
Advocates & Solicitors
Suites 1401 & 1409, 14th Floor Johor Tower
Jalan Gereja, 80100 Johor Bahru

Re: Johor Bahru High Court C.S.No. 238 of 1984
Johor Bahru High Court C.S.No. 24-184-87

To Our Professional Charges

To taking your instructions and perusing available documents and advising accordingly. Taking over conduct of these matters from M/s Lim & Hooi, who were then acting for you. Obtaining and perusing all other relevant documents from M/s Lim & Hooi, including the Writs of Summons and Statements of Claim, Statements of Defence and Counter Claim, Reply and Defence to Counter-Claim of Johor Bahru High Court Originating Summons No. 31-535-

86 and Affidavit in support. Summons for Directions, Agreement dated 22.12.1981, Deed of Assignment and Power of Attorney dated 11-8-1983. Agreement dated 11-8-1983, Issue Document of Titles in respect of H.S.(M) 112, Lot 5982 Mukim of Senai-Kulai and Grant No. 2018 Lot 1556 in the Township of Johor Bahru, the copious correspondence between M/s Patmanathan & Co and H.L. Tennakoon. Filing Notice of Change of Solicitors. Corresponding with the Defendants' solicitors. Preparing Bundle of Documents. Attending to Witnesses and taking their Statements. Preparing the cases for trial in the light of the facts of the cases, and the relevant law. Attendances in preparation for the trial. Attending Court for trial and for obtaining Judgment. Perusing Written Submission of Defendants and Authorities in support. Preparing, Filing, and Serving Written Submission of Plaintiff and Authorities in support. Perusing Defendants' Reply to Written Submission. Noting M/s Lim & Hooi's instructions to take over conduct of the matter from us. Correspondence with M/s Lim & Hooi and forwarding all relevant documents, cause papers and draft judgment to them. All other incidental matters, telefaxes, attendances and correspondences in connection thereto.

| | |
|---|---|
| Solicitors' Costs | RM35,000.00 |
| Add. Service Tax of 5% | RM 1,750.00 |

**DISBURSEMENTS:**

| | |
|---|---|
| XEROX | RM 130.50 |
| Telephone/Telefax Charges | RM 50.00 |
| Transport Charges | RM 100.00 |
| Postage Charges | RM 50.00 |
| Filing fees | RM 44.00 |
| Total | RM37,124.50 |
| Less Amount paid on 6.11.1992 | RM 1,000.00 |
| Balance | RM36,124.50 |

(Ringgit Thirty-Six Thousand One Hundred Twenty-Four and Cents Fifty Only)

E.&O.E.

Sgd. (Illegible).
Advocates & Solicitors
Johor Bahru

That bill took into account the respondent's payment of RM1,000 that was received on 6 November 1992 and it was for the balance sum of RM36,124.50. That bill too was issued for work done in two civil suits (hereinafter referred to as "the two matters"), *viz*, Johor Bahru High Court Civil Suit No: 238 of 1984 (where the writ summons filed therein can be

seen in exh. "SG 6" of encl. 3) and Johor Bahru Sessions Court Summons No: 307-1984 (where the summons filed therein can be seen in exh. "SG 7" of encl. 3). In due course, the Johor Bahru Sessions Court Summons No: 307-1984 was transferred to the Johor Bahru High Court and it was re-registered as the Johor Bahru High Court Civil Suit No: 24-184-1987 and consolidated with Johor Bahru High Court Civil Suit No: 238 of 1984. It would be germane to mention that the respondent was the plaintiff in both the two matters. The defendant in Johor Bahru High Court Civil Suit No: 238 of 1984 was Chan Seik Lan while the defendants in Johor Bahru High Court Civil Suit No: 24-184-1987 were Cheah Sooi Heng and Chan Seik Lan. It would also be pertinent to point out that in the Johor Bahru High Court Civil Suit No: 238 of 1984, the respondent sought specific performance of a deed of assignment and power of attorney in regard to a piece of land while in the Johor Bahru High Court Civil Suit No: 24-184-1987, the respondent claimed for the balance of a friendly loan that came up to the tune of RM19,000 only.

Mr. Guna took charge of the affairs of the two matters on 4 November 1992.

The trial of the two matters was conducted before James Foong J on four separate days – 15 November 1992, 16 November 1992, 17 November 1992 and 16 December 1992. James Foong J reserved judgment and on 17 March 1993 he dismissed both the two matters with costs against the respondent and he further declared the respondent to be an unlicensed moneylender.

The bill of costs as reproduced earlier (exh. "SG 20" of encl. 3) was accompanied by a covering letter dated 24 April 1997 from the petitioner to the respondent's then solicitors Messrs Lim & Hooi as can be seen in exh. "SG 19" of encl. 3 which had been reproduced earlier. This meant that the bill of costs was dated 24 April 1997. Now according to s. 121(1) of the Act, a solicitor's bill of costs may, at the option of the advocate and solicitor, either contain detailed items or be for a gross sum. According to the fourth paragraph of the covering letter dated 24 April 1997 as reproduced earlier, the bill of costs was for a gross sum. But a perusal of the bill of costs shows that the details of the works done and the steps taken in conducting the two matters for the respondent have all been lucidly set out in detail.

The respondent was quite fickle minded. There was an unusual propensity on the respondent's part to change solicitors. Both the matters were initially handled by Messrs. H.L. Tennakoon. Later, the two matters were taken over by Messrs Lim & Hooi. In October 1992, the respondent had a change of heart and he succeeded in convincing Mr. Guna to take over the conduct of the two matters even though the trial was fixed to be heard in a matter of days. Immediately after the judgment against the respondent was

announced by James Foong J on 17 March 1993, the respondent decided to switch allegiance. On 18 March 1993 the respondent re-instated Messrs Lim & Hooi as his solicitors to handle the two matters with a view to take conduct of the respondent's intended and proposed appeal against the judgment dated 17 March 1993 and at the same time to negotiate the quantum of the costs for the work done by Messrs Guna & Co.

The respondent affirmed an affidavit in reply on 24 March 1999 as seen in encl. 4 and there he exhibited a letter dated 22 May 1997 from Messrs Lim & Hooi to Messrs Anad & Noraini – the present solicitors of the respondent. That letter was duly marked as exh. "K 6" of encl. 4 and it categorically showed that as at 7 May 1997, Messrs Anad & Noraini had taken over the conduct of the two matters from Messrs Lim & Hooi.

Mr. Guna's relationship with the respondent had gone a long way. The respondent was introduced to Mr. Guna in early February 1989 by a mutual friend. Apart from the two matters now under dispute and the subject matter of the bill of costs, the law firm of Messrs Guna & Co. had also acted for the respondent in three other money lending matters and the detailed background facts have been lucidly set out in Mr. Guna's affidavit in encl. 3 from paras. 8 to 15. Suffice for me to say that the story that unfolded showed that the respondent was a habitual moneylender and litigant. The respondent was no fool. He was conversant with money lending matters and had numerous dealings with solicitors. He was, so to speak, a man of the world. He knew what was in store for him when he engaged Messrs Guna & Co. as his solicitors.

**The Respondent's Response To The Petition In Encl. 2**

The respondent's affidavit in encl. 4 alleged that he had already paid Messrs Guna & Co. the costs in full by way of a Pacific Bank cheque number 263636 dated 25 August 1992 in the sum of RM20,000 ("the cheque") in favour of "Mr. Gunasegaran a/l V. Singaravelu" – namely, Mr. Guna personally. The cheque in question was exhibited as exh. "K 1" of encl. 4. Indeed this was an interesting set of facts. But Madam Lathika Prabhakaran assisted by Madam J Chandrika submitted that the respondent had deliberately went on a frolic and had given an incomplete picture of the events which had transpired solely for the purposes of withholding evidence and making false and wild allegations.

**The Petitioner's Reply And Explanation In Regard To The Cheque**

It was the stand of the petitioner that the respondent did not at any time discuss the quantum of fees payable nor did the respondent ever mention about the sum of RM20,000 being the fees payable. According to the petitioner the cheque did pass hands but that cheque was related to an entirely separate matter altogether. It was said that the cheque was wholly

unconnected with the work done by Mr. Guna in the two matters for the respondent. According to the petitioner, the sum of RM20,000 as stipulated in the cheque was in fact in the nature of a personal friendly loan given by the respondent to Mr. Guna in his personal capacity sometime on 25 August 1992 and this was said to be well before Mr. Guna was asked to take over the conduct of the two matters in late October 1992. According to the petitioner, the friendly loan was repaid by Mr. Guna within a month from 25 August 1992 and this was said to be before he took over conduct of the two matters. According to the petitioner that friendly loan had been repaid in cash and no receipt was issued for the repayment.

As alluded to earlier, Mr. Guna used to conduct some of the respondent's cases which were related to the respondent's money lending activities. Mr. Guna affirmed another affidavit in encl. 6 on 25 May 1999 and at para. 8(ii) thereof this was what he deposed:

> 8. I crave leave of this Honourable Court to refer to paragraph 9 of the Respondent's 2nd Affidavit and wish to state as follows:
>
> (ii) Regarding sub-paragraph (c) I wish to reiterate that the sum of RM20,000.00 was a loan transaction. The said loan is also consistent with the Respondent's practice or business of money lending as demonstrated by the various actions he had brought in court against various persons and culminating in this Honourable Court declaring him to be an unlicensed moneylender on 17.3.1993. The only difference between those cases on the one hand and the present case on the other, is that unlike these cases no formal promissory note, I.O.U. etc was executed in the present case. Perhaps the Respondent did not deem it fit or necessary to request for such documentation, having regard to the fact that at the material time I was acting for him in a number of matters. Likewise I did not request for the receipt for repayment from the Respondent. Had I then suspected or anticipated that the Respondent would exploit this matter some time in future I certainly would have insisted on a receipt from him.

and clearly therefore the only difference between those cases and the loan of RM20,000 was that there was no formal promissory note, IOU or the like was ever executed in the present case.

Mr. S. Ravi Chandran for the respondent raised the following salient issues:

(1) Was there an agreement made between the respondent and Messrs Guna & Co., in respect of the amount or the manner of payment for the whole or any part of the costs in question?

(2) Did the sum of RM20,000 in the form of the cheque that was issued by the respondent represent the agreed costs of Messrs Guna & Co.?

Both Madam Lathika Prabhakaran and Madam J. Chandrika submitted that the evidence thus far adduced as seen in the various exhibits annexed to the affidavits filed herein categorically showed that there was no such agreement on costs and that the sum of RM20,000 in the form of the cheque was not paid towards any costs. They even submitted, quite rightly, that even to the casual observer the events which transpired and the correspondences which passed between the solicitors must logically show that the two issues raised by the respondent must be answered in the negative.

I must proceed further. The affidavit of Mr. Guna in encl. 3 depicted the scenario in its correct perspective. At para. 40 (2) of encl. 3, Mr. Guna averred that on or about 25 August 1992, the respondent gave him a short term personal loan of RM20,000 and that he had within one month repaid the said loan to the respondent by way of cash as requested by the respondent himself. At para. 16 of encl. 3, Mr. Guna deposed that he could clearly recollect the events that had transpired. He averred that it was after the filing of another suit on behalf of the respondent – that was sometime on 8 October 1992, and towards the end of October 1992 that the respondent requested him to handle and take over the two matters from Messrs Lim & Hooi which by then had been fixed for hearing on 15 and 16 November 1992. Mr. Guna recounted further and he said at para. 17 of encl. 3 that he had initially declined to act for two main reasons:

(1) he was not keen to take over conduct of the two matters from another solicitor; and

(2) he thought and felt that there was insufficient time for him to prepare the two cases.

To be fair to the plaintiff, I must reproduce in verbatim para. 17 of encl. 3 and it was worded in this way:

> I initially declined to act for 2 reasons namely; firstly, because I was not keen to take over conduct of matters from another Solicitor, and secondly, because I thought that there was insufficient time for me to prepare the cases. However, the Respondent prevailed on me to accede to his wishes by saying that he had a lot of confidence in me after his success in receiving a substantial sum of money in the 2 Sessions Court matters that were handled by me. Also even before I agreed to act for the Respondent, all the files pertaining to the 2 matters were already transferred to the firm of M/s Guna & Co.

and it seemed that Mr. Guna was cornered, so to speak, to handle the two matters. At para. 40(1) of encl. 3, Mr. Guna became more serious and he said that the allegation concerning the payment of costs in the sum of RM20,000 was a complete lie. Mr. Guna deposed that the respondent and

himself did not at any stage discuss the quantum of fees payable. It was an implied term of their relationship that the respondent would pay him for the professional services rendered. Mr. Guna deposed that he did not at any time ask the respondent to pay the sum of RM20,000 towards account of fees whether it be in Mr. Guna's name or in the name of Mr. Guna's law firm as alleged by the respondent. By way of para. 19 of encl. 3 it was stated that it was only on 4 November 1992 that Mr. Guna took over conduct of the two matters. The date was crucial and of utmost importance. This was the actual date when Mr. Guna took over the two matters. There was documentary evidence to indicate and show positively that 4 November 1992 was the actual date when Mr. Guna took over the affairs of the two matters. The relevant page from the register of cases of Messrs Guna & Co. was exhibited and marked as exh. "SG 8" in encl. 3 and the annotations recorded therein showed that the file for the respondent was opened on 4 November 1992 and was assigned the File Number 0440/92. And on the same day (see para. 20 of encl. 3), the respondent paid to Messrs Guna & Co. a sum of RM1,000 by way of Pacific Bank cheque number 263648 as part payment towards costs and disbursements and an official receipt from Messrs Guna & Co. bearing number 0913 was accordingly issued to the respondent. The duplicate copy of that official receipt dated 6 November 1992 was exhibited and marked as exh. "SG 9" in encl. 3 and it bore the handwritten words that read:

> part payment towards fees and disbursements (JBHC C/S No: 238-84 and JBHC C/S No: 24-184-87).

Mr. Guna proceeded further. On 7 November 1992 Messrs Guna & Co. filed notices of change of solicitors for the two matters and these can be seen in exhibits marked as "SG 10" and "SG 11" of encl. 3 which were in fact acknowledgment copies of the covering letters to the court. As alluded to earlier, both the two matters were heard on 15 November 1992, 16 November 1992, 17 November 1992 and 16 December 1992 and the judgment thereof was delivered on 17 March 1993.

Now, if the respondent's version of the facts were to be believed the scenario would be like this. Mr. Guna was appointed to act for the respondent on 25 August 1992 and the cheque for RM20,000 was also issued on the same day. But there was an alarming gap that went unexplained. It was this. What happened between 25 August 1992 and 4 November 1992 when Messrs Guna & Co. opened the files for the two matters had not been explained at all. It was rightly pointed out that no reasonable diligent lawyer in town faced with a new case for hearing in the High Court that was scheduled some two and a half months away would remain idle and not open an office file and not proceeding to prepare

for the hearing. Indolence is hardly the characteristic of Mr. Guna. Having served in the Johor Bahru High Court for some years and having had the pleasure of having Mr. Guna conducting cases before me, be it in chambers or in open court, I can certainly take judicial notice that he belonged to that category of lawyers who would toil for their clients day and night with sustaining power. I have said elsewhere in other reported judgments that the scope of judicial notice can never be closed. Since indolence was not the characteristic of Mr. Guna, the respondent managed to prevail upon Mr. Guna to take charge of the two matters and this was on 4 November 1992. Indeed if what the respondent said was correct and that Mr. Guna had agreed to take charge of the two matters on 25 August 1992 and that Mr. Guna had been paid for it, then the respondent being a litigant of some experience would definitely have kept tabs on the progress of the two matters and would have insisted that Mr. Guna proceeded with the preparation for the trial and failing which the respondent would have appointed some other solicitors in Johor Bahru to act in his stead. These would be the tell tale gaps in the respondent's version and they cannot be easily overlooked.

In my judgment, Mr. Guna's version of the prevailing facts were more credible. It was simply this. As soon as Mr. Guna decided to take charge over the conduct of the two matters on 4 November 1992, he swiftly caused an office file to be obtained. Next, he obtained an initial payment of RM1,000 by 6 November 1992 being the costs and disbursements from the respondent. Immediately thereafter, to be exact it was on 7 November 1999 that Mr. Guna proceeded to file the notices of change of solicitors in the High Court of Johor Bahru and he then went about the business of preparing for the trial as detailed and enumerated in the bill of costs dated 24 April 1997. Barring extreme indolence on Mr. Guna's part and total lack of apathy on the respondent's part, which would be most unlikely in the present case, these would be part and parcel of the customary steps which a solicitor in Malaysia would undertake in like circumstances for their clients.

In my judgment, the cheque for RM20,000 was issued on 25 August 1992 – well before the end of October 1992 when the respondent requested Mr. Guna to take over the two matters. In my judgment, the sum of RM20,000 was in the nature of a friendly loan. Mr. Guna knew the respondent way back in early February 1989 as alluded to earlier and there must have been rapport between the two of them. Friendly loans among friends are not uncommon in Malaysia and the present case was not an exception. The chronology of events showed beyond per adventure that the cheque for RM20,000 had nothing to do with the taking over of the two matters by

Messrs Guna & Co on 4 November 1992. Pure and simple, that cheque was in the nature of a friendly loan and nothing sinister should be read into it. This was my judgment and I so hold accordingly.

One vital fact that protruded like a sore thumb in the chronology of events would be the date when the question of the cheque for RM20,000 was first raised. The then solicitors for the respondent, namely Messrs Lim & Hooi had by letter enquired from Messrs Guna & Co. about costs on 18 March 1993 as reflected in exh. "SG 13" of encl. 3 which can also be seen in exh. "K 2" of encl. 4 and that was worded as follows:

> Re: J.B.High Court Civil Suit
> No. 238 of 1984
>
> ———————————
>
> We refer you to the above matter.
>
> We are instructed by M. S. Kulasingam the plaintiff in the above case to take over the matter from you in the further proceedings of the case.
>
> Please let us have all the relevant documents pertaining to the above case and also let us know whether your costs have been paid.
>
> Your immediate action will be much appreciated as you are aware that there is limitation of time to apply for leave to appeal to the Supreme Court.

and the response by letter from Messrs Guna & Co. to Messrs Lim & Hooi also dated 18 March 1993 can be seen in exh. "SG 14" of encl. 3 as well as in exh. "K 3" of encl. 4 and it was worded in this fashion:

> JOHOR BAHRU HIGH COURT CIVIL SUIT NO: 238 OF 1984
> JOHOR BAHRU HIGH COURT CIVIL SUIT NO: 24-184-87
>
> ———————————————————————
>
> We refer to the above matters and to your letter of even date.
>
> We have no objection to your taking over the above matters from us.
>
> In our view you will have to seek leave from the learned Judge to appeal against his judgment in the above matters. You are aware that the period to file in the Notice of Appeal is 30 days from date of Judgment, i.e. 17th March 1993.
>
> As for costs our fees for work done in the above matters would be in the sum of RM25,000.00. However strictly on a without prejudice basis we are prepared to accept a minimum sum of RM15,000.00 as our costs in lieu of taxation.
>
> Kindly forward us the sum of RM15,000.00 to us upon receipt of which we shall forward all the relevant documents pertaining to the above matters to you.

Messrs Guna & Co. listed the costs for their fees for the above two matters at RM25,000 and at the same time Messrs Guna & Co. was willing, without prejudice, to accept a minimum sum of RM15,000 as costs in lieu of taxation. Messrs Anad & Noraini were appointed to act as the respondent's present solicitors on or before 7 May 1997 as seen at exh. "K 6" of encl. 4. In that capacity, Messrs Anad & Noraini wrote to the petitioner on 30 May 1997 and 10 June 1997 (see exh. "SG 21" of encl. 3 which was similarly worded with exh. "K 8" of encl. 4 and exh. "SG 23" of encl. 3 which was similarly worded with exh. "K 9" of encl. 4) respectively. The letter dated 30 May 1997 was worded thus:

> Re: Johor Bahru High Court Civil Suit No: 238 of 1984
> Johor Bahru High Court Civil Suit No: 24-184-87
> ---
>
> We act for Mr. Kulasingam. We have taken over conduct of these matters from Messrs Lim & Hooi.
>
> We refer to your letter dated the 24/4/97 addressed to Messrs Lim & Hooi, enclosing the bills for work done.
>
> Our client disputes the bills. In the interim, our client would be obliged if your Mr. Guna could provide our client a full set of accounts and all monies received by him and his firm from our client. We would also like to receive details of party-party costs which was received in matters handled by Messrs Guna & Co. and which were not paid over to our client.
>
> Your early reply will be greatly appreciated.

while the letter dated 10 June 1997 was worded in this way:

> Re: Johor Bahru High Court Civil Suit No. 238 of 1984
> Johor Bahru High Court Civil Suit No. 24-184-1987
> ———————————————————
>
> We refer to your fax dated the 2nd instant.
>
> We further refer to our earlier letter to you dated 30th May 1997.
>
> You will note that in our earlier letter, our client disputes both your bills.
>
> We also take the view that due to lapse of time, you are not entitled to have the bills taxed at this stage.
>
> We reiterate our request for accounts as stated in our earlier letter as we have been informed by our client that there are other matters in which you acted for him and where party-party costs was paid and which was not paid over to him and for which receipts were not issued for the legal fees. We have also been informed by our client that he paid over to your Mr. Guna personally sums of money at various intervals on different dates, both by way of cash and cheque, and for which, no receipts were also issued.

Kindly let us have a full set of accounts to enable us to take further instructions from our client.

Your early response will be greatly appreciated.

It must be noted that the letters dated 30 May 1997 and 10 June 1997 were entirely silent in regard to the cheque of RM20,000. The dates were indeed significant and I shall elaborate further. It was only on 8 August 1997 that the question of that cheque surfaced. This was indeed the first occasion wherein Messrs Anad & Noraini writing to the petitioner on behalf of the respondent raised for the very first time the question of the cheque and it appeared that the respondent was saying that the sum of RM20,000 comprised in the cheque had been paid to Mr. Guna. The letter dated 8 August 1997 can be seen in exh. "SG 25" of encl. 3 as well as in exh. "K 12" of encl. 3 and it was worded in a no nonsense manner:

Re: Johor Bahru High Court Civil Suit No: 238 of 1984
Johor Bahru High Court Civil Suit No: 24-184-87

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We refer to your letter of the 23rd instant.

Our client is surprised by your Mr. Guna's denial of the receipt by him of monies from our client. In order to assist your Mr. Guna's memory we enclose herewith a photocopy of a cheque drawn in your Mr. Guna's favour for Ringgit Malaysia Twenty Thousand (RM20,000.00), which our client can easily prove was cleared through his accounts. Similarly there were other payments made to Mr. Guna for which no receipts were issued.

Our client is also surprised that you are now attempting to claim fees for these two old matters. In any event we would be pleased to know the total amount of party-party costs recovered in the two matters and as to what has happened to these costs.

Surely you would agree with us that our client is entitled to full accounts of all monies received by his solicitor during the period he was a solicitor.

We are instructed to ask for the last time that you render us full accounts within 16 days from date hereof.

It must be recalled that the first correspondence between Messrs Lim & Hooi and Messrs Guna & Co. on the question of costs took place on 18 March 1993. Calculation wise when the respondent raised the issue of the cheque for RM20,000 on 8 August 1997, there was a lapse of four years four months 20 days from 18 March 1993. In short, the significance of that cheque was only highlighted too late in the day and the cheque's purported connection with the costs for the two matters, if there was such a connection, appeared to have taken less prominence in the eyes of the

respondent. It would be next to impossible to believe the respondent. A friendly loan suddenly became related to both matters by way of costs. Indeed if the respondent were to be believed, then for a man well versed in money transactions and conversant with instructing solicitors, the respondent suddenly had a remarkable memory lapse – an incredible memory remiss, tantamount to negligently managing his affairs at his own peril. In my judgment, the plain facts speak for themselves. It can be seen that in the early part of 1993, the respondent admitted his liability to pay costs to his solicitors and was only interested in reducing the quantum. In 1997, when the respondent was confronted with the issue of the unpaid costs, the respondent decided to cloud the issue and resorted to obvious ruse involving the cheque. I shall demonstrate in a moment that the cheque in question was totally irrelevant to the issue of the costs.

As alluded to earlier the cheque was made out in favour of "Mr. Gunasegaran a/l V. Singaravelu" – meaning to Mr. Guna personally and not to the law firm of Messrs Guna & Co. At para. 40(2) of encl. 3, Mr. Guna deposed as alluded to earlier that no official receipt was ever issued by the law firm of Messrs Guna & Co., to the respondent for the sum of RM20,000 because that sum was not part of the fees but rather it was in the nature of the loan and the nature of the transaction – it being a friendly loan, did not warrant the issue of a receipt from Mr. Guna. If it was true that the sum of RM20,000 was indeed paid to Mr. Guna as fees, surely the respondent who knew the finer points of transacting money would have been cautious and have insisted for a receipt to reflect the nature of the payment. But this was not to be.

What has the respondent got to say in rebuttal? Here reference to encl. 4 should be ideal. At para. 4(a) of encl. 4 the respondent said that he was asked by Mr. Guna to issue a cheque in the latter's personal name although the sum was being paid as fees payable to Messrs Guna & Co. The fallacy of this averment was quite obvious. Mr. Guna was the sole proprietor of Messrs Guna & Co., and no advantage would have been gained by Mr. Guna in obtaining a cheque in his personal name as payment for work to be done by him in his official capacity while running the law firm of Messrs Guna & Co. It must be recalled that upon accepting the two briefs from the two matters on 4 November 1992, Mr. Guna obtained the payment of RM1,000 from the respondent towards costs and disbursements as reflected in the official receipt of Messrs Guna & Co., in exh. "SG 9" of encl. 3. If it was true that the respondent had paid the sum of RM20,000 as fees, he would surely have refused to pay a further sum of RM1,000 after all these two sums were related to both the two matters. In an attempt at embellishment, the respondent affirmed an affidavit in reply on 11 May 1999 as seen in encl. 5 and there the respondent proceeded to recompose

his version. The respondent deposed in encl. 5 that Mr. Guna had agreed to take over the conduct of the two matters provided the respondent paid Mr. Guna the sum of RM20,000 towards account of fees excluding disbursements and in addition to that the respondent was asked to pay RM1,000 as disbursements. But it must be emphasised that the receipt for the sum of RM1,000.00 categorically stated that the said sum was meant as part payment towards both fees and disbursements and this very receipt exposed the respondent as a compulsive liar and, consequently, the new version of the respondent must fall flat to the ground like a deck of cards. This was my judgment and I so hold accordingly.

**The Respondent Acknowledged The Petitioner's Entitlement To The Solicitor's Fees**

After James Foong J handed down his decision on 17 March 1993 in regard to the two matters, the respondent immediately discharged Messrs Guna & Co., from further acting for him in those matters and the respondent instructed his former solicitors, namely, Messrs Lim & Hooi to take back conduct of the two matters. I have alluded to the letter dated 18 March 1992 from Messrs Lim & Hooi to Messrs Guna & Co., and in that letter it was stated that Messrs Lim & Hooi had been instructed to take over both the matters and it enquired whether Messrs Guna & Co.'s costs had been paid by the respondent. This was the very letter that was written by Messrs Lim & Hooi after the respondent had given his instructions. Indeed if the sum of RM20,000 had been paid as costs, this very crucial and essential fact would not have escaped the attention of the respondent when he instructed his new solicitors, namely Messrs Lim & Hooi to act for him. I am sure if the respondent had instructed Messrs Lim & Hooi in regard to the sum of RM20,000, that law firm would have raised the issue and posed relevant questions to Messrs Guna & Co., in regard to it. Alas there was not a single query posed by Messrs Lim & Hooi to Messrs Guna & Co.

I did say that Messrs Guna & Co.'s reply was that their costs for work done in the two matters would be in the sum of RM25,000 but that strictly without prejudice, Messrs Guna & Co., was prepared to accept a minimum sum of RM15,000 as costs in lieu of taxation. In turn, Messrs Lim & Hooi responded by letter dated 22 March 1993 as seen in exh. "SG 15" of encl. 3 and exh. "K 3" of encl. 4 in these words:

> We are instructed by our client (referring to the respondent) to inform you that your fee of RM15,000.00 is excessive and he is prepared to pay your fee provided you reduce the amount to a more reasonable sum.

Towards the middle of the second last paragraph, the letter was worded in this way:

> On our part we will undertake to protect your lien of costs as soon as you have come to an agreement with our client in respect of your costs.

The contents of these letters without a doubt showed that the respondent had not paid any fees to Messrs Guna & Co., in regard to both the two matters – apart, of course, from the initial payment of RM1,000. It also showed that there was no agreement between Mr. Guna and the respondent in regard to the question of costs. The respondent's instructions to his solicitors were all written in the letters as alluded to somewhere in this judgment and these letters were all written in plain English, so plain that it was easily understood by all and sundry. According to the respondent's instructions, his solicitors took the necessary steps to negotiate the costs to which Messrs Guna & Co., were entitled to. The solicitors did not make any mention of the cheque or even the sum of RM20,000 because these were matters that had nothing to do with the fees payable and the respondent did not refer to these matters in his instructions to his lawyers. That would be the truth of the matter.

I have earlier alluded to the letter dated 8 August 1997 and I have described that letter to be an exercise in embellishment and I do not propose to dwell on it anymore.

**Nature Of The Bill Of Costs**

It was the stand of the respondent that an itemised bill should have been given. The bill has been described purely as a bill for gross sum. The bill in the present case was delivered on or about 24 April 1997 and by virtue of proviso (a) to s. 121(1) of the Act, the respondent had until 23 July 1997 to ask the petitioner to deliver to him a bill containing the detailed items.

From the facts as represented in detail in the early part of this judgment, the situation was indeed bleak for the respondent. This was a case where the respondent's solicitors, namely, Messrs Anad & Noraini had engaged in protracted correspondences on the matter. I need to narrate them:

(1) On 30 May 1997, Messrs Anad & Noraini wrote to the petitioner (exh. "SG 21" of encl. 3 and exh. "K 8" of encl. 4);

(2) On 10 June 1997, Messrs Anad & Noraini wrote to the petitioner (exh. "SG 23" of encl. 3 and exh. "K 9" of encl. 4);

(3) On 8 August 1997, Messrs Anad & Noraini wrote to the petitioner (exh. "SG 25" of encl. 3 and exh. "K 12" of encl. 4); and

(4) On 28 November 1997, Messrs Anad & Noraini wrote to the petitioner (exh. "SG 26" of encl. 3 and exh. "K 14" of encl. 4).

and in these correspondences, Messrs Anad & Noraini had touched on many matters concerning the bill as well as on matters not concerning the bill, but Messrs Anad & Noraini did not at any point of time request nor enquire for a more detailed bill. Such conduct would certainly be construed adversely against the respondent. It can be surmised that neither the respondent nor his solicitors were in any doubt as to the contents of the bill and as to the details of the work done. In my judgment, having failed to ask for a detailed bill within the time limit as prescribed in proviso (a) to s. 121(1) of the Act, the respondent was thus precluded from raising the issue at this point of time. In my judgment, a taxing order will certainly not prejudice the respondent at all. Once the bill has been referred to taxation, and in accordance with proviso (c) to s. 121(1) of the Act, the petitioner shall furnish the taxing officer with such details as the taxing officer may require. Furthermore, any further details of the bill shall be provided at the taxing stage.

**The Time Limit**

The respondent submitted that an order for taxation ought to be made within one year. This must be done from the date of the delivery of the bill. The bill was dated on 24 April 1997 and it was **delivered by hand** on the same day (see the covering letter dated 24 April 1997 as seen in encl. 3, exh. "SG 19" where the words "BY HAND" appeared therein). Since the petition was filed on 17 April 1998 it squarely came within a span of one year from the delivery of the bill and thereby complied with s. 126(1) of the Act.

It would be correct to say that the phrase "may be obtained by a petition" appearing in s. 126(1) of the Act must be construed to mean "may be obtained by a petition filed" within the relevant time frame. Local cases on the construction of s. 126(1) of the Act have all assumed that the provision requires the applicant to **apply** rather than **obtain** an order within the relevant time frame. This should be the correct interpretation to construe s. 126(1) of the Act for the following salient reasons:

(1) The first step in obtaining an order for taxation would be by filing the petition. The determination of the date of filing of the petition would be well within the control of the parties and for that reason the limitation period invariably hinges on the filing date as a point of reference.

(2) The fixing of the date of hearing of the petition and the actual date when the petition will be heard are beyond the control of the parties and are not matters within the purview of the parties. Dates for hearings are usually fixed according to the court's calendar as well as

to the availability of the judge or the senior assistant registrar. Taking into consideration the very limited resources available to the courts, a construction which makes it mandatory for a party to obtain a court order within a stipulated time period can be said to be both impractical and unrealistic.

(3) Even if the court grants an early hearing date, postponements are said to be inevitable as it would enable parties to file affidavits in reply and further affidavits. The respondent may be able to defeat the petitioner's claim by the late filing of an affidavit which requires a reply and in turn it necessitates a postponement at the very last minute.

(4) It is both vague and arbitrary when a limitation period requires the obtaining of an order within a specified time period. To me limitation periods by their very nature should be clear and certain. It is a well established rule that limitation periods are imposed to prevent litigants from sleeping on their rights and not to punish them.

(5) After the delivery of a bill like the present case, the parties may want to enter into negotiations in order to arrive at an agreed sum. If the parties are constrained by a vague rule of limitation, the party seeking taxation will be discouraged and will forgo negotiation and instead will litigate the matter straight away thereby indirectly contributing to the court's backlog and thus compounding the matter further.

**Section 128(2) Of The Act**

Section 128(1) of the Act enacts that after the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the court. Section 128(2) of the Act enacts that no such order for taxation shall in any event be made after the expiry of one year from the delivery of the bill of costs.

In my considered view the prohibition in s. 128(2) of the Act relates to applications for taxation by clients and not by the solicitors. Whereas s. 128(1) of the Act specifically mentions "six months" which happens to be the time limit applicable to clients as stated in s. 126(1) of the Act. Moreover the need on the part of the client to give notice to the solicitor clearly confines s. 128 of the Act to applications by clients.

**Was There One Or Two Gross Sum Bills?**

According to Mr. S. Ravi Chandran for the respondent, the petitioner has served two gross sum bills to the respondent. He said that the first bill of costs would be by way of the petitioner's letter dated 18 March 1993 as

seen in encl. 3 of exh. "SG 14" and in encl. 4 of exh. "K 3" which was addressed to the respondent's then solicitors, namely, Messrs Lim & Hooi. He also said that the second bill of costs was dated 24 April 1997 and this has been reproduced in the early part of this judgment and I shall not concern myself with it for the moment. The focal point of attention would be the first bill of costs and it has also been reproduced somewhere in this judgment.

The first bill of costs was in fact a letter from Messrs Guna & Co., addressed to Messrs Lim & Hooi and I have read, on several occasions, the letter in question and I have to say that it was indeed far-fetched to argue that this letter was a bill of costs. It was simply a letter and nothing else. It was a letter dated 18 March 1993 and it formed part of a series of correspondences beginning with this very letter and ending with a letter dated 24 April 1997 as seen in exh. "SG 19" of encl. 3 which letter had also been reproduced earlier in this judgment and that very letter in fact annexed the second bill of costs which was the one and only bill of costs. The letter dated 18 March 1993 showed the negotiations undertaken by both sides in order to agree on the issue of costs. A perusal of the letter dated 18 March 993 would clearly show that that letter was not a bill of costs but rather it contained a proposal for the settlement of costs.

In my judgment, there was only one bill of costs in the present case. It was a bill of costs dated 24 April 1997 showing a figure of RM36,124.50.

***Yau Jiok Hua v. Sykt Kilang Batu-Bata Chip Siah Sdn Bhd (supra)***

Augustine Paul J held in *Yau Jiok Hua* that when there was an apparent conflict between s. 121(1)(b) of the Act on the one hand with that of s. 126(1) of the Act and s. 128(1) of the Act on the other hand and in order to avoid the conflict, the latter provisions must be construed to refer only to a bill of costs containing the detailed items and not to a gross sum bill. With respect, I beg to disagree and I will advance the reasons in due course. The facts in *Yau Jiok Hua* must be examined at some length and for this exercise I shall proceed to itemise the chronology of the main events according to the relevant dates.

**27 May 1997**

The plaintiff's solicitor delivered his gross sum bill to the defendant's client.

**26 November 1997**

Six months from the date of the delivery of the bill expired and the time bar in s. 126(1) of the Act and s. 128(1) of the Act came into effect.

**9 December 1997**

The plaintiff issued his writ to recover the costs.

**24 December 1997**

The writ was served on the defendant.

**22 January 1998**

The defendant filed an application under s. 121(1)(b) of the Act for taxation of the plaintiff's gross bill.

**23 January 1998**

One month from the date of service of the writ would have expired. The time bar in s. 121(1)(b) of the Act would have come into effect.

Briefly, s. 121(1) of the Act provides that in the absence of an agreement for costs in respect of contentious business, the solicitor's bill of costs may at the option of the solicitor either contain detailed items or be for a gross sum. This provision is subject to three provisos.

Proviso (a) briefly states that at any time before service upon the client of any originating process for the recovery of costs in a gross sum bill and before the expiration of three months from the delivery to him of the bill, the client may require the solicitor to deliver to him a bill containing detailed items and thereupon the gross sum bill shall be of no effect.

Proviso (b) briefly states that where an action is commenced on a gross sum bill, the client can request the court for taxation within one month from the service on him of the writ.

Proviso (c) briefly states that if the gross bill is referred to taxation, nothing in s. 121 of the Act shall prejudice any rules of court with respect to taxation and the solicitor shall furnish the taxing officer with such details of any of the costs covered by the bill as the taxing officer may require.

Section 126 of the Act when read with s. 128 of the Act gives this effect. It requires the client to apply for taxation of a "bill of costs" within six months from the delivery of the bill of costs. The section uses the generic term "bill of costs".

The plaintiff's solicitor in *Yau Jiok Hua* contended that since the six months period prescribed in s. 126(1) of the Act had expired, the defendant's client was not entitled to apply for taxation of the bill. Augustine Paul J felt that the submissions on both sides on this point generated an apparent conflict between the two sets of provisions. The apparent conflict centred on the different cut-off points for filing an

application for taxation in the two sets of provisions. The cut-off point in s. 121 of the Act was one month from the date of service of the writ whereas the cut-off point in s. 126 of the Act was six months from the date of delivery of the bill. Augustine Paul J worded that conflict in this way (see p. 245 to p. 246 of the CLJ report):

> The underlying feature of the conflict between ss. 121(1)(b) and 126(1) read with s. 128(1) that surfaced in the course of the submission of both parties would appear to arise where a solicitor delivers a gross sum bill and commences proceedings for its recovery after the expiry of six months from its delivery in the absence of any request from the client for a bill containing detailed items as provided by s. 121(1)(a). In such circumstances, it would appear that the client would be unable to obtain an order for taxation as a matter of course as the six-month period prescribed by s. 126(1)(b) read with s. 128(1) would have expired unless there are special circumstances in his favour. On the other hand, s. 121(1)(b) would appear to entitle him to have the bill taxed upon request if he does so before the expiration of one month from the service of the writ or other originating process claiming the sum due even though the six month period had expired. If in fact there is a conflict between both the provisions, it would mean that the commencement of an action six months after the delivery of a bill of costs would render the right conferred by s. 121(1)(b) otiose. The sequence of events in this case is anchored on this apparent conflict.

What Augustine Paul J was trying to say was this. That if the cut-off point in s. 121 of the Act arises after the cut-off point in s. 126 of the Act, and the application for taxation is allowed within the later time limit then the cut-off point in s. 126 of the Act appears to be rendered meaningless.

With respect, it is my considered view that there is in fact no conflict whatsoever between the two sets of provisions for the following reasons:

(1) The scheme of the act gave different roles to s. 121 and ss. 126/128 of the act

In my considered view, s. 121 and ss. 126/128 of the Act have totally different roles to play. Section 121 of the Act is comprised in Part VIII of the Act and it is entitled: "Remuneration of Advocates and Solicitors". While ss. 126 and 128 of the Act are comprised in Part IX of the Act entitled "Recovery and Taxation of Costs". It must be emphasised that these are the only two Parts governing costs which appear in the Act.

(2) Part VIII is specific

Part VIII, consisting of ss. 112 to 121 of the Act, sets out principles governing solicitors' remuneration. Section 112 of the Act prohibits solicitors from purchasing the interest of clients. Section 113 of the Act provides for the constitution of the Solicitors Costs Committee. Section 115 of the Act relates to the costs of negotiating a mortgage made to a solicitor.

Sections 116 to 120 of the Act relate to agreements for costs in respect of contentious business. Section 121 of the Act covers the situation where no agreement on costs in respect of contentious business has been reached. In such an eventuality, the solicitor must issue a bill of costs which may either contain detailed items or be for a gross sum. Three provisos (a) to (c) appear below s. 121(1) of the Act and I need not dwell on them as I had alluded to them earlier.

(3) Part IX is general

In sharp contrast would be Part IX and under it there are ss. 122 to 136 of the Act. Part IX sets out the rules for the recovery and taxation of costs in great detail. It is intended to cover both contentious and non-contentious business. It is quite obvious that the whole of Part IX consisting of fifteen sections makes no distinction at all between gross sum bills and detailed bills. The phrase "bill of costs" as earlier defined in s. 121 of the Act includes both gross sum bills and detailed bills, and that phrase can also be found in ss. 124, 125, 126, 128, 129, 130 and 132 of the Act. In other parts of the Act, the words "costs" and "bill" appear. Nowhere in Part IX do the specific expressions "bill for a gross sum" or "bill containing detailed items" or their abbreviated forms appear.

Indeed it is very obvious that Part IX with its detailed rules governing enforcement and taxation is meant specifically to apply to both gross sum bills as well as detailed bills, whether issued in regard to contentious or non-contentious business. The scheme of the Act is such that each section in Part IX must equally apply to all bills, and in that sense ss. 126 and 128 of the Act are general in nature and they would apply to both types of bills as spelt out in s. 121(1) of the Act.

(4) General and specific provisions

Sections 126 and 128 of the Act are general in nature, whereas proviso (b) to s. 121(1) of the Act is specific. Section 121(1) of the Act by itself is confined to contentious business. Proviso (b) to s. 121(1) of the Act applies to gross sum bills only. Now, in applying the rule of construction as found in the *maxim generalia specialibus non derogant*, both the specific rule in s. 121(1)(b) of the Act and the general rule in ss. 126 and 128 of the Act must be allowed to operate independently and harmoniously.

The intention of the legislature must be given effect and must predominate. Lord Blackburn in *Edinburgh Street Tramways v. Torbain* [1877] 3 App. Cas. 58 at p. 68 succinctly said:

> I quite agree that in construing an Act of Parliament we are to see what is the intention which the legislature has expressed by the words, but then the words again are to be understood by looking at the subject matter they are speaking of and the object of the legislature, and the words used with reference to that may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances and another object would or might have produced.

In *Attorney-General for Canada v. Hallett & Carey Ltd* [1952] AC 427 at p. 449, Lord Radcliffe echoed the same sentiment:

> There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention.

In the same vein, Lord Reid in *Westminster Bank Ltd v. Zang* [1966] AC 182 at p. 222 had this to say:

> But no principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act. If those words are in any way ambiguous – if they are reasonably capable of more than one meaning – or if the provision is contradicted by or is incompatible with any other provision in the Act, then the court may depart from the natural meaning of the words in question; but beyond that we cannot go.

Lord Denning MR in *I.R.C. v. Bates* [1965] 1 WLR 1133 at p. 1147 emphasised on the need to look at the intention of Parliament in construing certain tax provisions and this was what his Lordship said:

> If we gave them his interpretation, it would make nonsense of the statute. But he exhorted us to take heart from the decision of the House of Lords in *I.R.C. v. Ayrshire Employers* [1946] 27 TC 331, where the legislature 'plainly missed fire.' So here we should give the words their literal interpretation heedless of what Parliament intended. I cannot think that this is right. It would reduce the interpretation of statutes to a mere exercise in semantics. Whereas the object, as I have always understood it, is to ascertain the intention of the legislature. This intention must be discovered, of course, from the words which they have used ... But the words must be sensibly interpreted. We do not sit here to make nonsense of them.

The will of the legislature must be given effect. It is the bounden duty of the court to interpret the words of the legislature notwithstanding that those words may be ambiguous. It is not the duty of the court to fill the gaps in a statute, such duty would lie with Parliament and that would be by introducing an amending Act (*Assam Railways & Trading Co. v. I.R.C.* [1935] AC 445).

Using these principles as guidelines, it is my considered view that s. 121(1)(b) of the Act comes into play only when certain specific conditions spelt out therein exist and these conditions may be listed as follows:

(i) the business done or undertaken by the solicitor must be confined to contentious business;

(ii) the remuneration of the solicitor must not be the subject of an agreement;

(iii) the bill, which must have been delivered to comply with s. 124 of the Act, must be a gross sum bill; and

(iv) an action must have been commenced on the gross sum bill.

and only when these conditions exist, will the client have one month from the date of the service of the writ to request the court to tax the bill. In this kind of situation, the fact that the six month period under s. 126 of the Act has or has not expired should not be a relevant consideration.

(5) The rules governing taxation of gross sum bills

According to *Yau Jiok Hua*, s. 121 of the Act governs gross sum bills whereas ss. 126 and 128 of the Act govern detailed bills. With respect, to adopt this kind of interpretation would lead to the unrealistic construction that the whole of Part IX is inapplicable to gross sum bills or gross sum bills in contentious matters. This would certainly lead to an absurd eventuality. It would mean that there are no written rules whatsoever governing taxation of gross sum bills. For instance, s. 129 of the Act provides that all petitions by a party chargeable with a "bill of costs" shall contain a submission by the party to pay the amount of the "bill of costs" to the solicitor when taxed. However, when applying *Yau Jiok Hua*, this provision would lead to detailed bills only. Yet another instance would be s. 134 of the Act which sets out the one-sixth rule in relation to costs of taxation. And if one follows *Yau Jiok Hua*, this provision should only apply to detailed bills.

Since in *Yau Jiok Hua*, the provision in s. 124 of the Act (found in Part IX) was in issue, the court there decided that its interpretation of the "bill of costs" should not apply to that term in s. 124 of the Act (see p. 252 para. "b" to p. 255 para. "b" of the CLJ report). In essence s. 124 of the Act prohibits a solicitor from suing for his costs until the expiration of one month after he has delivered a "bill of costs" to his client. Whereas s. 125 of the Act empowers the court to authorise a solicitor to commence an action for recovery of his costs and refer his bill to taxation although one month has not expired in certain circumstances. Augustine Paul J in

*Yau Jiok Hua* held that the meaning to be ascribed to the phrase "bill of costs" in ss. 126 and 128 of the Act had to be departed from in interpreting s. 124 of the Act. Thus, although in his judgment, the phrase "bill of costs" in ss. 126 and 128 of the Act meant a detailed bill of costs, yet the very same phrase in ss. 124 and 125 of the Act included both gross sum bills and detailed bills. I am of the considered view that this approach is entirely illogical. Just imagine if in future another court is confronted with another section in Part IX of the Act containing the phrase "bill of costs", that court would be compelled to make another piecemeal exception to the interpretation placed by Augustine Paul J in *Yau Jiok Hua*.

**Is There A Lacuna?**

If *Yau Jiok Hua* is correctly decided, then there is a serious flaw in the law or a lacuna in the law in that the taxation of gross sum bills is left at large, unguided by the Act whereas detailed bills are subject to the innumerable rules found in Part IX of the Act. A glaring lacuna would be the absence of a time bar for the taxation of gross sum bills in the event that no action is commenced on a gross sum bill. This would also mean that the solicitor may not have to commence an action but he may recover his costs by way of a counterclaim in an action already begun by his former client. In these circumstances, s. 121(1) of the Act would not apply and according to *Yau Jiok Hua*, neither would ss. 126 and 128 of the Act.

**The Sum Total Of Section 121 Of The Act**

In reality s. 121(1)(b) of the Act provides that if a gross sum bill is referred to taxation, whether under that section "or otherwise", nothing therein shall prejudice any rules of court with respect to taxation and the advocate and solicitor shall furnish the taxing officer with such details of any of the costs covered by the bill.

It would be pertinent to point out that the other provisions for taxation are all found in Part IX of the Act. Naturally, gross sum bills must attract the provisions on taxation in ss. 126 and 128 of the Act.

**Was The Decision In *Yau Jiok Hua Per Incuriam*?**

With the greatest of respect, the conclusion arrived at by the court in *Yau Jiok Hua* in regard to the interpretation to be placed on the phrase "bill of costs" in ss. 126 and 128 of the Act was, in fact, arrived at unaided by either counsel for the plaintiff or the defendant in that case. It is a state of affairs which indicate that the decision may have been given *per incuriam*. Ultimately his Lordship in *Yau Jiok Hua* decided in favour of the defendant but the particular approach adopted by his Lordship was not part of the defendant's counsel arguments (see p. 250 para. "C" of the CLJ report). Augustine Paul J in *Yau Jiok Hua* sought solace and echoed the

view of Lord Wilberforce in *Saif Ali & Anor v. Sydney Mitchell & Co (A Firm) & Ors* [1980] AC 198 at p. 212:

> ... Judges are more than mere selectors between rival views – they are entitled to and do think for themselves.

But with respect, his Lordship was deprived of proper argument and counter argument and he may well have arrived at a different conclusion had he invited counsel's submissions on the point in issue.

**The case of *Exparte Farmers' Fertilizers Corporation Ltd* [1916] 16 SR (NSW) 645**

When the court in *Yau Jiok Hua* decided that the term "bill of costs" must be confined to detailed bills, it referred to the decision of *Ex parte Farmers' Fertilizers Corporation, Ltd.* That was a decision of the Full Bench of New South Wales and its persuasive authority is certainly at its lowest ebb. In that case, the issue which the court had to decide was whether there had been "payment" of a bill within the meaning of s. 36 of the New South Wales Legal Practitioners Act 1898 which provided that payment of a bill shall not preclude a reference to taxation if the special circumstances of the case warranted it and the payment had not been made more than twelve months or over. The facts in that case may briefly be stated as follows. There the solicitor who acted for the mortgagee, rendered the mortgagor an account, without details, for the costs of a lump sum in December 1914. In January 1915, the mortgagor objected to the amount and paid only part of it. In March 1915, when paying the mortgagor the balance of the mortgage moneys, the mortgagee deducted the balance sum of the costs charged by their solicitor on account of legal expenses. The mortgagor then applied for and obtained a detailed bill of costs in February 1916 which was then referred to taxation. The solicitor contended that as the balance sum of their costs had been deducted by the mortgagee, there had been payment of the bill more than twelve months before the application for taxation. The *ratio decidendi* of that case was that the deduction did not amount to a payment of the bill within the meaning of s. 36 of the New South Wales Legal Practitioners Act 1898 and therefore the application was said to be within time. It is interesting to note that by way of an *obiter dictum*, the court in that case ventured to state the meaning of the word "bill". At p. 649 of the report, the Chief Justice delivering the judgment of the court in that case said:

> The word 'bill' as used in the Act is defined in section 21, sub-section (3) as 'a bill of fees, charges and disbursements.' The authorities upon that definition show what is meant is a detailed account showing the specific items of work done, and the specific charges allocated to each of those.

But the words "a detailed account" should not necessarily mean a detailed bill and this expression was used in contrast with "an account-without details" which was the document that was sent by the solicitor to the mortgagor. The only bearing which the definition of "bill" had on the decision in that case was that the mortgagor, who was not the client of the solicitor, by reason of that very fact should have been given a detailed bill of costs; instead the mortgagor was given "an account" from the solicitor. Earlier on, the Chief Justice in that case remarked at p. 649 of the report:

> The present is a case not between a solicitor and his own client, but between a solicitor and the mortgagor who was liable for the payment of the proper costs chargeable by the mortgagee's solicitor. The delivery of an account in December, 1914, preceded the first of the two payments which I have already mentioned, but it was not a detailed bill which would enable the mortgagor to exercise his judgment on the propriety of the amount of the charges.

Continuing at p. 650 of the report, the Chief Justice said:

> Remembering that the solicitor for a mortgagee is one who acts, as was pointed out in one case, in the interests of the mortgagee rather than of the mortgagor, the latter has no protection if the mortgagee makes the deduction from the loan moneys without affording him an opportunity of scrutinising the items.

It would appear that the court was mindful of the fact that the mortgagee, not being the actual client of the solicitor, should have been given sufficient particulars of the work done and expenses incurred. The court was inclined to adopt the view that a detailed account of the charges should have been rendered before payment. The decision of the court in that case has got no bearing whatsoever to the case at hand because the present case was based on a bill rendered by the solicitors to their own client.

In the present case, the gross sum bill as reproduced earlier (see exh. "SG 20" of encl. 3), in spite of its label, it clearly sets out the work done in detail and the respondent as the client was never in the dark as to the nature of the work done. It was because of this reason that the respondent and his solicitor did not bother the petitioner by asking for a more detailed bill.

Furthermore, the discussion on the meaning of the word "bill" in that case was merely by way of an *obiter dicta*. The actual decision for allowing the taxation and holding that it was not blocked by s. 36 of the New South Wales Legal Practitioners Act 1898 was the fact that deduction of the costs from the mortgage monies did not amount to payment. In the present case, there was no question of payment and for that reason that case – referring

of course to *Ex parte Farmers' Fertilizers Corporation, Ltd*, was quite irrelevant.

**The English Decisions That Were Discussed In *Ex parte Farmers' Fertilizers Corporation Ltd* – An Australian Case**

The Australian decision of *Ex parte Farmers' Fertilizers Corporation Ltd* discussed a few English authorities, namely:

(1) *In re Baylis* [1896] 2 Ch. 107;

(2) *In re West King and Adams* [1892] 2 QB 102;

(3) *Hitchcock v. Stretton* [1892] 2 Ch. 343 at 351;

(4) *Ex parte Hemming* 28 LT 144; and

(5) *In re R.G. Thompson* [1894] 1 QB 462.

and none of these cases state that a "bill of costs" in the context of the general limitations on taxation means a detailed bill of costs as opposed to a bill for a gross sum.

In *Hitchcock v. Stretton*, no bill of costs had been delivered at all until after the client's commencement of the action for an account and delivery of the bill. The solicitors had kept a running account with the client in which they credited him with moneys received and debited him with disbursements and professional costs. The accounts were periodically signed by the client as "settled and approved" but no bills were delivered. The court, applying *Ex parte Hemming*, held that as the payments had been made in the account were referable to the bill subsequently delivered, the client was not entitled to taxation.

The same scenario appeared in *In re Baylis*. There the sums retained by a solicitor as costs had been entered in accounts settled and approved by the client. But no bill of costs had ever been delivered. The Court of Appeal held that the retainer was not payment. Chitty J writing a separate judgment for the Court of Appeal had this to say at p. 111 of the report:

> There is no authority for the proposition that a mere settled account, where no proper bill has been delivered in the true sense of the term 'bill,' is payment within the Solicitors Act 1843. Since the Act of 1881 there may be a good bill delivered in particular cases, as, for instance, where the scale applies, the bill merely stating one scale item. There may also be a good bill within the Act of 1881 referring 'to costs as agreed'.

But *In re West King and Adams* and in *In re R.G. Thompson*, the facts indicated agreements for costs and these two cases were poles apart from the facts of the present case. Nevertheless, all the English cases cited in *Ex parte Farmers' Fertilizers Corporation, Ltd* were cases where the solicitors did not render any bill of costs prior to the proceedings or at all and only accounts had been drawn up and signed by the client. These cases cannot therefore be an authority for the proposition that only detailed bills of costs can be taxed under the general statutory provisions for taxation.

**Form Of The Bill – An Unimportant Consideration**

The form of the bill is of no consequence. It can take whatever form. The end result would be the avenue for taxation by the client. *Yau Jiok Hua* strictly confines this avenue to detailed bills and it in fact works against the interest of the client who has received a gross sum bill. There are passages appearing in *Cordery's Law* relating to solicitors, 8th edn, Frederic T. Horne, Buttterworths, London and Edinburgh, 1988 that merit reproduction and which would add a different complexion to the case of *Yau Jiok Hua*. Those passages were worded as such (see p. 163 thereof):

> Although the (English) Act contains no provisions directly regulating the form and contents of the bill beyond the permissive direction that it may either be a bill containing detailed items or a gross sum bill, in actual practice a solicitor who delivers a gross sum bill must always ensure that he is able to substantiate the amount of his bill by means of detailed items for any one or more of the following reasons:
>
> (a) the party chargeable with a gross sum bill may at any time within three months from the date of delivery of the bill, provided he has not then been served with a writ or other originating process for the recovery of the bill, require the solicitor to deliver a bill containing detailed items and on such a requirement being made the gross sum bill shall be of no effect (See the (English) Act s. 64(2). *Carlton v. Theodore Goddard & Co* [1973] 2 All ER 877, [1973] 1 WLR 623; where the requirement was made more than three months after delivery the solicitors were refused leave to substitute the detailed bill for the gross sum bill);
>
> (b) If the solicitor begins an action to enforce payment of a gross sum bill the court may, on the application of the party chargeable made within one month of service on him of the proceedings, order that the bill be taxed (See the (English) Act s. 64(3));
>
> (c) If such an order is made or if an order for taxation is made on the direct application either of the solicitor or the client the taxing officer having conduct of the taxation may, and almost invariably will, direct the solicitor to lodge full details of the costs covered by the gross sum bill (See the (English) Act s. 64(4)).

With respect, *Yau Jiok Hua* wrongly assumed that a gross sum bill was to be excluded from the provisions of ss. 126 and 128 of the Act because it was not in a form that was ready for taxation according to O. 59 r. 24 of the RHC. This assumption was clearly in error in view of the existence of s. 121(1)(c) of the Act. In short, once a gross sum bill is referred to taxation, the taxing officer may require the advocate and solicitor to furnish him with such details of any of the costs covered by the bill.

**Conclusion**

For the reasons adumbrated above, I granted order in terms of prayers (i), (ii) and (iii) of the petition in encl. 2.